IN THE SUPREME COURT OF THE STATE OF DELAWARE

EFRAIN RIVERA,	§	
	§	No. 534, 2010
Defendant Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr. ID No. 0908013580
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 17, 2011
Decided: July 25, 2011

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

O R D E R

This 25th day of July 2011, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Efrain Rivera, was found guilty by a Superior Court jury of Rape in the First Degree, two counts of Terroristic Threatening, Menacing and Endangering the Welfare of a Child. He was sentenced to a total of 21 years and 30 days of Level V incarceration, to be suspended after 15 years for decreasing levels of supervision. This is Rivera's direct appeal.

(2) Rivera's counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and b) the Court must conduct its own review of the record in order to determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[1]

(3) Rivera's counsel asserts that, based upon a careful and complete examination of the record and the law, there are no arguably appealable issues. By letter, Rivera's counsel informed Rivera of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Rivera also was informed of his right to supplement his attorney's presentation. Rivera responded with a brief that raises several issues for this Court's consideration. The State has responded to the position taken by Rivera's counsel as well as the issues raised by Rivera and has moved to affirm the Superior Court's judgment.

[1] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Rivera raises several issues for this Court's consideration, which may fairly be summarized as follows: a) he was improperly convicted of Rape in the First Degree because there was no evidence of penetration; b) he was improperly convicted of Terroristic Threatening because there was no evidence he had a weapon; c) the police did not testify truthfully; and d) the victim was not credible.

(5) The testimony presented at trial established the following. In August 2009, the 23 year-old victim and her 3 month-old son were living with her uncle and his family in the City of Wilmington. On August 14, 2009, several friends of the victim's uncle, including Rivera, were at his house. Rivera had been drinking beer and appeared intoxicated. Rivera left the house around 11:00 p.m., but returned a few minutes later and asked to spend the night. The victim's uncle refused to allow Rivera to stay, escorting Rivera to the door and locking the door behind him.

(6) In the early morning hours of August 15, 2009, the victim, who was sleeping in her bed with her baby beside her, was awakened by Rivera, who was standing over her with a knife in his hand. Rivera, wearing only a shirt and socks, told the victim, in crude fashion, that he wanted to have sex with her. Rivera told the victim that, if she screamed, he would harm her and the baby. He slapped her face and put his hand over her mouth. Rivera

attempted to have sex with the victim, but failed to fully penetrate her.[2] Ultimately, he ejaculated on the victim's vagina. Rivera then left the room. The victim screamed that she had been raped. She awakened her uncle, who called 911. The victim's uncle observed that the kitchen window was open and that Rivera's pants and shoes were on the floor. The police collected the items as evidence. The victim underwent a sexual assault examination that morning. Photographs taken at that time showed bruising to her face. The victim later identified Rivera from a photographic array. DNA testing of the victim's pajamas and swabs from Rivera and the victim linked Rivera to the crime.

(7) Rivera's first two claims are, in essence, that there was insufficient evidence presented at trial to support his convictions of Rape in the First Degree and Terroristic Threatening. In reviewing a claim of insufficiency of the evidence, this Court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt.[3]

(8) Rivera was charged and convicted of Rape in the First Degree under Del. Code Ann. tit. 11, §773. The definition of first degree rape

[2] The victim testified at trial that Rivera did not penetrate her. The State introduced her prior statement under Del. Code Ann. tit. 11, §3507 in which she stated that she felt the tip of his penis on her vagina.

[3] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (citing *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991)).

contained in the statute consists, in part, of engaging in "sexual intercourse" without the consent of the victim. "Sexual intercourse" is defined in Del. Code Ann. tit. 11, §761(g) as "[a]ny act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight." There was evidence presented at trial that the tip of Rivera's penis touched the victim's vagina and that he ejaculated on her vagina. The subsequent medical examination of the victim and the DNA analysis were consistent with that evidence. We are satisfied, based upon the evidence presented at trial, that a rational juror could have found Rivera guilty of Rape in the First Degree. We, therefore, conclude that Rivera's first claim is without merit.

(9) Rivera also was charged with and convicted of Terroristic Threatening. Under Del. Code Ann. tit. 11, §621(a) (1), a person is guilty of terroristic threatening when that person "threatens to commit any crime likely to result in death or in serious physical injury to person or property." Even though there was sufficient evidence presented at trial that Rivera threatened the victim with a knife, possession of a weapon is not required for a conviction of terroristic threatening. There was evidence presented at trial that Rivera threatened to harm the victim and her child. We are satisfied, based upon that evidence, that a rational juror could have found Rivera

guilty of Terroristic Threatening. We, therefore, conclude that Rivera's second claim is without merit.

(10) Rivera next claims that the police did not testify truthfully at trial and that the victim was not credible. It is well-settled that questions of credibility are within the exclusive province of the jury.[4] The jury is likewise solely responsible for resolving any conflicts in the testimony of the witnesses at trial.[5] We find no indication in the record of this case that the jury did not properly fulfill its duties. We, therefore, conclude that Rivera's third and fourth claims also are without merit.

(11) This Court has reviewed the record carefully and has concluded that Rivera's appeal is wholly without merit and devoid of any arguably appealable issues. We also are satisfied that Rivera's counsel has made a conscientious examination of the record and the law and has properly determined that Rivera could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:
/s/ Carolyn Berger
Justice

[4] *Knight v. State*, 690 A.2d 929, 932 (Del. 1996).
[5] Id.